IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6284 of 1999

For Approval and Signature:

Hon'ble HON'BLE MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ISMAIL IBRAHIM

Versus

EXECUTIVE ENGINEER

Appearance:

1. Special Civil Application No. 6284 of 1999

MR AS SUPEHIA for Petitioner No. 1

Mr. N.D. Gohil, Asstt. GP for Respondents.

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 26/08/2003

ORAL JUDGEMENT

Heard learned advocate Mr. A.S. Supehia for the petitioner and Mr. N.D. Gohil, learned AGP for the

respondents. This petition was admitted by this court by issuing rule thereon by order dated 23rd August, 1999 and it was made returnable on 2nd September, 1999.

In this petition, the petitioner has challenged the decision of the respondents in denying the pensionary benefits to the petitioner. It is the case of the petitioner that he worked with the first respondent as a daily wager from September, 1974 and from 19th June, 1984, he worked as a work charge employee and retired as such on 30th November, 1991. According to the petitioner, he completed more than ten years service and yet the benefit of pension has been denied to the petitioner only on the ground that the service rendered by the petitioner as a daily wager cannot be counted while counting qualifying service for the purpose of pension.

The respondents have filed reply to the present petition through one DM Shah working as Executive Engineer with the first respondent. In para 5 of the said reply, the deponent has averred that the petitioner was initially appointed as rojamdar in the year 1974 and he worked as such till 1983; from 1984, he has become eligible for being appointed as work charge employee and he was appointed as such and worked as such till 1991, upto his retirement and, therefore, according to the respondent no.1, length of the petitioner's service on the work charge establishment is less than ten years and the initial service s rendered by him as daily wager cannot be clubbed together as both are separate. In reply, the deponent has made a mention of one special civil application No. 3607 of 1982 filed before this court wherein judgment and order was delivered by this court against the State Government and, thereafter, the State Government has filed appropriate proceedings before the apex court and the apex court has granted stay in favour of the State of Gujarat and, therefore, according to the respondents, benefit of pension cannot be given to the petitioner while considering services rendered by him as a daily wager. Except these submissions, no other contentions have been raised by the deponent in his affidavit in reply filed on behalf of the respondents.

Learned advocate Mr. Supehia appearing for the petitioner has submitted that the petitioner was working with the first respondent in R & B Department of the State of Gujarat. He has also relied upon the Government Resolution dated 17.10.1988 and submitted that the said resolution is applicable to the petitioner, being an employee of the R & B Department. He has also submitted

that according to the terms and conditions of the said Government Resolution dated 17.10.1988, the petitioner is entitled for the pensionary benefits after he completed ten years service as required under section 25B of the ID Act, 1947. He also submitted that the petitioner was fulfilling the terms and conditions of the Government Resolution dated 17.10.1988 and, therefore, the respondents are not justified in denying such benefits in favour of the petitioner and that is also contrary to the Government Resolution dated 17.10.1988. He also submitted that it is not the case of the respondents that the said Government Resolution dated 17.10.1988 is not applicable to the petitioner or that the petitioner is not fulfilling the terms and conditions of the said Government Resolution dated 17.10.1988. He also submitted that the respondents are not justified in not considering the services rendered by the petitioner as a daily wager from 1974 till the date on which he was absorbed as work charge employee. He submitted that the said resolution has been considered by this court in Special Civil Application No. 2836 of 1998 on 27th August, 1998 wherein this Court (Coram : K.R. Vyas,J.) has observed that according to the GR dated 17.10.1988, the services rendered by the work charge employee as a daily wager is also required to be counted. This court has also observed that in the resolution dated 17.10.1988, it has been envisaged that those workmen who has, on 1.10.1988 or thereafter, completed ten years continuous service to be counted in accordance with the provisions of section 25B of the ID Act, 1947 shall be deemed to be permanent under the resolution dated 17.10.1988 and the entire continuous service from the date of entry until his retirement including the services rendered prior to the date of his regularization is required to be taken into consideration for the purpose of computing pension or making pension available to such a retired employee. He has also relied upon the decision of the Division Bench of this Court in the matter of CHHAGANBHAI RANCHHODBHAI RATHOD VERSUS DY. EXECUTIVE ENGINEER dated 6.8.1998 in Letters Patent Appeal No. 1495 of 1997 in SCA No. 7539 of 1997. He has also relied upon the recent decision of this Court in the matter of MALEK UMARKHAN ALIKHAN Versus STATE OF GUJARAT decided by this Court on 16.7.2003 and reported in 2003 (2) Gujarat High Court Judgments 201. He has placed reliance on para 16 and 17 of the judgment which will be considered by this court hereinafter. It was, thus, his submission that the respondents are not justified in excluding the periof of service rendered by the petitioner as daily wager from 1974 till the date on which he was absorbed as work charge employee while

considering the case of the petitioner for pension and, therefore, the decision of the respondent denying pensionary benefits to the petitioner is required to be quashed and set aside as the same is contrary to the provisions of the GR dated 17.10.1988 as well as the aforesaid decisions of this Court.

As against that, learned AGP Mr. N.D.Gohil appearing for the respondent authorities has submitted that the services rendered by the petitioner as daily wager cannot be counted while considering qualifying service for pensionary benefits and if the service rendered by the petitioner as work charge employee is taken into consideration, the petitioner is not completing ten years service and, therefore, the respondent authorities were right in denying the pensionary benefits to the petitioner while considering the service as work charge employee alone and, therefore, there is no substance in this petition and the same is required to be dismissed. Except this, no other submissions have been made by the learned AGP Mr. N.D. Gohil on behalf of the respondents.

I have considered the averments made by the petitioner in the memo of petition as well as the affidavit in reply filed on behalf of respondent no.1. I have also considered the submissions made by the learned advocates for the parties. From the averments on record, it is not in dispute that the petitioner worked as daily wager from September, 1974 and from 19th June, 1984, he worked as a work charge employee and retired as such on 30th November, 1991. The respondent no.1 has not denied these facts but it is the case of the respondent no.1 that the period of service rendered by the petitioner as a daily wager from Sept. 1974 till 19th June, 1984 cannot be taken into consideration while considering the case of the petitioner for pension and considering the period of service rendered by the petitioner as work charge employee in the establishment of the first respondent, the petitioner is not completing ten years' qualifying service and, therefore, the respondents have rejected his case for pension. Therefore, if the entire period of service rendered by the petitioner, initially as a daily wager and then as work charge employee is taken into consideration, then, it is clear that the petitioner workman is completing ten years continuous service as defined under section 25B of the ID Act and also as per the GR dated 17.10.1988, and, therefore, the petitioner is entitled for the pensionary benefits. The decision which has been taken by the respondents denying such benefits to the petitioner is, therefore, illegal,

arbitrary, contrary to the GR dated 17.10.1988 and also violative of Article 14 of the Constitution of India as the said Resolution is also not making any distinction between the services rendered by the employee as a daily wager and work charge employee. Said GR provides that the workman who has completed the continuous service of ten years within the meaning of section 25B of the ID Act, 1947 shall be entitled for pensionary benefits. There is no such distinction made in the said resolution and, therefore, according to my opinion, the petitioner is entitled for such benefits as per the GR dated 17.10.1988.

This aspect has been examined by this Court in the matter of CHHAGANBHAI RANCHHODBHAI RATHOD VERSUS DY. EXECUTIVE ENGINEER dated 6.8.1998 in Letters Patent Appeal No. 1495 of 1997. The observations made by the Division Bench of this Court in the aforesaid matter are reproduced as under:

" As per the resolution dated October 17, 1988, daily wager worker who has put in service for more than 10 years as per section 25-B of the Industrial Disputes Act, 1947 is entitled for retiral benefits. Section 25B of the Industrial Disputes Act 1947 defines 'continuous service'. According to said provision, a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including the service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock out or a cessation of work which is not due to any fault on the part of the workman. Sub section (2) of section 25-B introduces a deeming fiction and provides that where a workman is not in continuous service within the meaning of clause (i) for a period of one year or six months, he shall be deemed to be in continuous service under the circumstances mentioned in the said sub section.

From the abstract which is produced by the learned Counsel for the respondents, there is no manner of doubt that in all for 14 years, the appellant had worked for more than 240 days. The Supreme Court, in the case of Workmen of American Express International Banking Corporation v. Management of American Express International Banking Corporation, AIR 1986 SC 458, has ruled that continuous service is to be counted by

including Sundays and other holidays, sickness or authorized leave and accident or strike which is not illegal or cessation which is not due to any fault on the part of the workman. The respondents have failed to produce any material on record of the case to indicate that in the year 1980-81, there was a cessation of work due to any fault on the part of the appellant. Therefore, the appellant had continuously served for a period of more than ten years within the meaning of resolution dated October 17, 1988. The submission made by the learned counsel for the respondents that the appellant had completed 240 days work in 8 years only which is less than 10 years and, therefore, the appellant is not entitled for pension, cannot be accepted. It is an admitted fact that while denying the claim of the appellant, Sundays and other holidays, sickness of authorized leave etc. were not taken into consideration by the respondents, nor the question was considered whether there was any cessation of work which was not due to any fault on the part of the appellant. It may be stated that the appellant served as a daily wager for about 21 years and retired from service on October 13, 1989. Having regard to the facts of the case, even there were some small breaks in service of the appellant which had taken place in the years 1980-81 and 1981-82, they have been condoned by the respondents for the purpose of retiral benefits. On the facts and in the circumstances of the case, we are of the opinion that as the appellant had completed 240 days work continuously in 10 years in which he had worked for more than 240 days, he is entitled to the benefit of pension. The learned Single Judge was not justified in rejecting the claim of the appellant on the ground that the appellant had not worked for 240 days continuously in 10 years and was, therefore, not entitled to pension. The appeal, therefore, deserves to be accepted."

From the aforesaid decision of the Division Bench of this Court, it would appear that the workman concerned worked as daily wager with the employer for a period of about 21 years and this court has, after considering the decision in the matter of Workmen of American Express International Banking Corporation v. Management of American Express International Banking Corporation, AIR 1986 SC 458, and also considering section 25B and the deeming fiction of section 25B, has laid down that the

workman therein is entitled for the pension. If the case of the present petitioner is considered, then, it is clear that initially he worked from Sept. 1974 till 1984 as rojamdar and thereafter worked as work charged employee till his retirement and the respondents rejected his claim for pension only on the ground that he has not worked for ten years as work charged employee and, therefore, not entitled for pension. In view of the aforesaid decision of the division bench of this court, it is clear that the respondents have wrongly denied such benefits in view of the provisions of the GR dated 17.10.88 as well as section 25B and the aforesaid decision of this court.

In the matter of MALEK UMARKHAN ALIKHAN Versus STATE OF GUJARAT decided by this Court on 16.7.2003 and reported in 2003 (2) Gujarat High Court Judgments 201 this Court has observed as under in para 16 and 17 of the judgment:

"16. In view of the above observations, the net effect of section 25-B sub section (1) is to the effect that if the daily wager has remained in continuous service for a period of one year and his service has not been interrupted by any reason mentioned mentioned in sub section (1), whatever kind of cessation of work which is not due to the fault of the daily wager, then, his service must have to be considered continuous for a period of one year irrespective of the fact whether such daily wager has completed 240 days actual work or not during this one year. Reason is that during the one year, though the daily wager has not completed 240 days continuous service, but during that period also, the services of such daily wager has not been terminated by the employer and in-between the relationship of the employer and employee was remaining in force which makes continuous service of one year and that period must be taken into consideration irrespective of the fact that 240 days actual work has been completed or not by such daily wager but such daily wager has remained in service with the employer on permanent employment and pensionable service. Similarly, in respect of sub section (2) of section 25B of the ID Act, if the daily wager is not remaining in service for a period of 12 calender months but even less number of months but he completes 240 days working, then also, that less number of months may be considered for

one year continuous service. This being two distinct and different situation incorporated by the legislature in sub section (1) and (2) of section 25B of the ID Act, if the daily wager is satisfying either of the one, then his services must have to be considered continuous for a period of one year within the meaning of section 25B of the Industrial Disputes Act, 1947.

17. I have minutely perused the Government Resolution dated 17.10.1988. This Resolution has been issued by the State Government after having conscious decision and consulting all the respective departments of the State Government to give certain benefits similar to a permanent employee of the State Government to the daily wagers who are working in various departments. On the basis of the report submitted by the Committee, said resolution has been issued by the Government in favour of the daily wager for regularization of their services after number of years. Item No. 1 of the said Resolution is relating to the daily wagers who have put in the service of less than five years. Such daily wagers shall be paid their daily wages in accordance with the existing Minimum Wage Rules and after completion of one year service with 240 or more actual working days, such daily wagers will be eligible for weekly off with pay, medical facility and festival holidays with pay."

Therefore, in view of the aforesaid discussion and also in view of the aforesaid two decisions of this Court, one of the Division Bench of this Court and the another of this Court itself, it is clear that for considering the case of a workman for pensionary benefits as per the GR dated 17.10.1988, whole period of the service from the date of his entry till the date of his retirement in service, each year of his service wherein he has completed continuous service of one year as defined in section 25B of the ID Act is required to be taken into account for considering his case for pensionary benefits. In the instant case, if the respondent no.1 ought to have considered the whole period of service rendered by the petitioner initially as a daily wager and then as a work charge employee from the date of his entry till the date of his retirement. However, instead of that, the respondents have erroneously considered the period of his work charge employment alone for consecrating his case for pension

and since the petitioner was not completing ten years qualifying service while considering his employment as work charge employee, have rejected his case for pensionary benefits. It was not submitted on behalf of the respondents that even if the whole period of service rendered by the petitioner is taken into consideration, the petitioner is not entitled for such benefit. Therefore, in view of the aforesaid legal position and also in view of the facts of the present case, the petitioner is entitled for the pensionary benefits from the date of his retirement.

Therefore, according to my opinion, service rendered by the petitioner as a daily wager also must be counted for considering his case for pension. The petitioner is entitled for the pensionary benefits according to the GR dated 17.10.1988 while including and considering his service as a daily wager and such benefit has wrongly been denied to the petitioner by the respondents on the erroneous technical ground without properly considering the G R dated 17 10 1988 which has deprived the petitioner from the pensionary benefits for such a long period. The respondents have not assigned any other just cause for denying the pension to the petitioner. In view of these peculiar facts of this case, I am of the opinion that the respondents are not justified in denying pension to the petitioner and also considering the present rate of interest and since it is also a matter of 1999, therefore, I am of the opinion that the petitioner should get arrears of his pensionary benefits from the date of his retirement 31st October, 1991 till 31st August, 2003 with interest at the rate of 9 per cent per annum by way of damages as the respondents have deprived the petitioner from the source of his livelihood in the days of his retirement for such a pretty long period and have utilized the said amount of the petitioner for such a pretty long period.

For the reasons recorded hereinabove, this petition is allowed. Order passed by the Executive Engineer of the respondent No. 1 dated 27.11.1998 is hereby quashed and set aside and it is directed to all the respondents herein to pay the pensionary benefits with all due arrears with running interest thereon at the rate of 9 per cent per annum to the petitioner with effect from the date of his retirement namely 31.10.1991 till 31st August, 2003 within the period of three months from the date of receipt of copy of this order and thereafter, to continue to make such payment of pension regularly every month without any interruption to the petitioner. Rule is made absolute accordingly with no

order as to costs.

Dt.25.8.2003. (H.K. Rathod,J.)